

Navigating the Interstate Compact on the Placement of Children: Advocacy Tips for Child Welfare Attorneys

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Introduction: Samira's Case

- 7-year-old in Monroe, Michigan
- Placed in an emergency foster home.
- Samira's aunt was eager to take her in.
- The judge, GAL and agency caseworker all supported the move.
- But Samira's aunt lived right across the border in Toledo.

Samira's Case, continued

- The ICPC applied because of the interstate nature of the placement
- Placement needed approval from Ohio.
- A home assessment was required.
- Months passed and no action was taken.
- Then Ohio denied the placement because of “concerns” about the aunt’s relationship with Samira’s mother.
- Child remained in foster care.

Many of us have experienced this

- What do you do?
- How do you advocate?
- Do you have any options?

Does the ICPC Apply?

The ICPC governs the interstate placement of “any child for placement in foster care or as a preliminary to a possible adoption.”

-Article III(a)

Does the ICPC Apply?

- What is a “placement in foster care?”
- Is a visit a placement?
 - No. Model Regulation No. 9(1) explicitly states that a visit is not a placement. But a visit longer than 30 days is presumed to be a placement. But the model regulations are not binding.
 - In re Emmanuel R., 2001 Cal. App. LEXIS 3109 (Cal. Ct. App. 2001)(visits not covered by the ICPC)

What is “foster care?”

- “Foster care” means:
 - “The care of a child on a twenty-four-a-day basis away from the home or the child’s parent(s). Such care may be by a relative of the child, by a non-related individual, by a group home, or by a residential facility or any other entity. **Model Regulation No. 3(5).**
 - “In addition, if twenty-four-hour-a-day care is provided by the child’s parent(s) by reason of a court ordered placement (and not by virtue of the parent-child relationship) the care is foster care.”
Model Regulation No. 3(5).

But model regulations are not binding unless specifically incorporated into state law. Not incorporated in Michigan.

Is a placement with relative a placement in “foster care”?

- In Michigan, the answer is likely yes.
 - MCL 712A.13a(1(e)): Foster care “means care provided to a juvenile in a family foster home, foster family group home, or child caring institution licensed or approved under MCL 722.111 to 722.128, or care provided to a juvenile in a relative’s home under a court order.”
- Other states have found otherwise. Arkansas Dep’t of Health and Human Services v. Jessica Jones, 2007 Ark. App. LEXIS 46 (Ark. Ct. App. 2007); In the Matter of J.E., B.E., 2007 N.C. App. LEXIS 801 (N.C. Ct. App. 2007); N.J. Div. of Youth & Family Servs. v. K.F., 803 A.2d 721 (N.J. Super. Ct. App. Div. 2002); In the Matter of Lisa B., 2006 N.Y.Misc. LEXIS 1735 (N.Y. Sup. Ct. 2006) (inapplicable where grandparents filed a separate custody action regarding foster children)

Is placement with birth parent a placement in “foster care?”

- Model regulations say yes, except in limited situations involving non-custodial parents. But they are not binding and regs cannot expand the scope of the statute. See *McComb v. Wambaugh*, 934 F.2d 474 (3d Cir. 1991)
- Michigan definition of foster care excludes parents.
- Courts are split on the issue.
- Most recent decision: *In re Alexis O.*, No. 2008-133 (N.H. 2008) (holding ICPC does not cover placements with birth parents)

But in practice.....

- Most state agencies and trial courts act as if the ICPC covers placements with relatives and birth parents
- E.g. Louisiana Statistics: FY 2006: 627 requests submitted; 283 (relatives), 182 (parents); FY 2007: 451 requests submitted; 215 (relatives), 138 (parents)

Even if the statute is interpreted to cover placements with parents...

- Don't forget about the Constitution
- Can use arguments at various points of the case.
 - At the outset to argue that the Compact should not be applied.
 - After a significant period of time has passed and the home study has not been completed.
 - After the home study has been denied
 - If the home study is approved, placement is made and the consent is subsequently revoked.

Constitutional Arguments

Substantive Due Process

- *Stanley v. Illinois*, 405 US 645, 650 (1972) (“[A]s a matter of due process of law, Stanley as entitled to a hearing on his fitness as a parent before his children were taken from him.”)
- *Troxel v. Granville*, 530 US 57, 68-69 (2000) (“[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”)
- Interests are not diminished just b/c parents do not live with their children.

Substantive Due Process

- ICPC only requires case worker to make finding that placement is contrary to the child's interest. No unfitness finding is required.
- Placements have been denied for many reasons such as cramped living quarters or the presence of lead paint that have nothing to do with parental fitness.
- High rate of denial. Michigan Stats: FY 2007, Michigan denied 40% of completed home study requests and other states denied 50% of Michigan's requests to place children elsewhere.

Procedural Due Process

- Before the State can abridge a person's liberty interest, the Procedural Due Process Clause of the Fourteenth Amendment requires that it afford that person a meaningful opportunity to be heard. Must be at a meaningful time and in a meaningful manner.
- If pre-deprivation hearing cannot be provided, then prompt post-deprivation hearing is constitutionally mandated.
- Procedural due process clause is implicated both by the lengthy delay in the completion of the home studies AND the denial of a judicial hearing if the home study is denied.

Procedural Due Process-Delay

- Federal courts have determined that parents have actionable claims under Sect. 1983 for delay in court hearing
 - Jordan by Jordan v. Jackson, 15 F.3d 333, 351 (4th Cir. 1994) (finding that even a sixty-five hour period “is near, if not at, the outer limit of permissible delay between a child’s removal from his home and judicial review.”)
 - Weller v. Dep’t of Social Services, 901 F.2d 387, 396 (4th Cir. 1990) (four month delay in adjudicating a father’s deprivation of custody rights clearly violates the prompt due process the Constitution requires).

Procedural Due Process

Length of Time To Complete Home Study

- Federal law requires interstate home studies to be completed within 60 days. In reality, it takes much longer.
- In limited circumstances, the State may deprive an individual of a protected interest if the hearing is expeditiously provided after the deprivation. Boddie v. Connecticut, 401 US 371, 379 (1971) (e.g. emergency removals)
- This doesn't happen with the Compact.

Procedural Due Process-No Opportunity to Challenge Finding

- Judicial review of home study is explicitly prohibited by the Compact
- Most states, including Michigan, do not provide any form of administrative review of a home study denial
- In my informal survey, 35 states responded that no process existed to appeal an ICPC denial
- Only options after denial are to either ask that the request be resubmitted in the future or move

Procedural Due Process- No Opportunity to Challenge Finding

- This practice contravenes constitutional requirement that affords aggrieved parties a meaningful opportunity to be heard.
- In *Stanley v. Illinois*, 405 US 645 (1972), the Court suggests that, in the context of depriving parents of custodial rights, a judicial hearing must be provided. Such a hearing is explicitly prohibited by the Compact

Equal Protection Clause

- EPC of the Fourteenth Amendment requires that the government treat similarly situated individuals alike.
- A state classification that treats people differently will receive strict scrutiny if it impermissibly interferes with the exercise of a fundamental right.
- In order to survive a strict scrutiny analysis, the statute must be shown to be supported by a sufficiently important state interest and narrowly tailored to further that interest.

Equal Protection Clause

- The Compact treats similarly-situated individuals with the same fundamental due process rights – in state and out of state non-offending parents – very differently.
- Parents in both groups have not been found to be unfit, and therefore retain the fundamental interest in raising their children.

Yet, two classes are treated very differently

- In-state parents: retain presumption of fitness, can gain custody immediately, no requirement for home study, right to a court hearing, ability for placement to be made by a judge even if negative home study, appellate rights
- Out-of-state parents: no presumption of fitness, must wait months for completion of home study, no right to a judicial hearing, no ability for placement if negative home study, no appellate rights

ICPC Does Not Survive Strict Scrutiny

- Not narrowly tailored. It's overly broad and doesn't further the State's interest in the safety and protection of children.
- No reason to diminish due process rights of out of state parents.
- Less intrusive means are available
 - Prompt post-deprivation hearing; presumption of fitness; judicial review, appellate rights

Persuasive burden

- Even if you convince the judge that the ICPC does not apply, need to show that placement serves the child's interests.
 - Private home study
 - Criminal and child protective checks
 - Testimony from caregiver
 - Appropriate services in place

If the ICPC Does Apply...

The next step will be to get the receiving state to complete a **home study** of the potential placement ASAP.

Get the home study done as soon as possible.

Is it a Priority Placement?

- ICPC Model Regulation 7. Applies when
 - Completed paperwork sent to receiving state and over 30 days has passed.
 - If the proposed placement recipient is a relative AND
 - the child is under two years old OR
 - resides in an emergency shelter OR
 - has spent a substantial amount of time in the home of the proposed placement recipient.
- Need to get detailed order from judge listing time requirements set forth in the model regulation
 - Paperwork must be sent out within 5 business days
 - Home study must be completed within 20 business days

Use the court system to get the paperwork out of your state's hands

- Get detailed court orders describing what needs to happen by when.
- Schedule regular review hearings while ICPC process is pending
- File for contempt or take other appropriate actions if your state agency is not processing the paperwork in a timely manner.

Working with the receiving state

- Once the paperwork is submitted, you lose a lot of control. Court has no jurisdiction over receiving state agency.
- Work with the state's ICPC office to get regular updates.
- When appropriate, contact receiving state ICPC administrators for updates. Find out name and contact info for caseworker completing the home study. Remember that they know very little about the case.
- Be helpful, not adversarial. Informal advocacy.
- Work with caregiver to make sure he/she provides proper paperwork
- Address delays
 - Missing information
 - Incomplete paperwork
- Ask court to order sending state to file monthly status reports with copies to all parties. Ensure accountability.

If placement is approved

- Work with your local child welfare agency and the court to facilitate the transfer of custody.
- Don't wait until the next hearing (if the hearing is months away). File a motion and get the placement changed.

If the Placement is Denied...

...the next step is to figure out
how to **challenge** it.

Challenging a Denial is Difficult

- Placement cannot happen without approval from the receiving state.
- Standard: whether the placement “does not appear to be contrary to the interests of the child.” No further definition of the standard.
- Few states have an administrative process to review a denial.
- No judicial review.

Be Creative!

- Work with both states to address the issues underlying the denial. Resubmit paperwork?
- Explore administrative remedies
 - Administrative Procedures Act
- Request a placement hearing
 - Challenge the entire framework as being unconstitutional, especially if the rights of parents are involved.
 - Best interests should trump strict compliance.
- Help the caregiver file for custody, guardianship, adoption
 - Are orders in these cases covered by ICPC?
- Political pressures: media, public officials
 - E.g. New York Times Article

Help Reform The Process

- New ICPC is pending. You can view information about the proposed Compact at at <http://icpc.aphsa.org/Home>
- It will be considered by Michigan soon. Make your voices and stories be heard.